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No. 99-1038

In The
Supreme Court of the United States
October Term, 1999

EASTERN ASSOCIATED COAL CORPORATION,
Petitioner,

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT 17;
LOCAL 1702, UNITED MINE WORKERS OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE THE INSTITUTE FOR A DRUG-FREE WORKPLACE IN SUPPORT OF THE PETITIONER

DAVID A. SUTTON
Counsel of Record
MARK A. DE BERNARDO
KATHERINE A. GOETZL
LITTLER MENDELSON, P.C.
1225 I Street, N.W., Suite 1000
Washington, D.C. 20005
(202) 842-3400

Counsel for Amicus Curiae,
The Institute for a
Drug-Free Workplace

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Petitioner,

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT 17; LOCAL 1508, UNITED MINE WORKERS OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37.2(b) of this Court, the Institute for Legal Reform, a project of the Center for Workplace Law, respectfully moves for leave to file the attached amicus curiae brief in support of Petitioner, Eastern Associated Coal Corporation.[*] In support of its Motion, the Institute states:

The Institute is a non-profit coalition of private businesses and business organizations dedicated to

[*] Prior to filing this Motion, the Institute sought the consent of both parties to the filing of its brief, as required by Rule 37.2 of this Court. The Petitioner consented to the Institute's request. The Institute was unable to contact the Respondent, necessitating this Motion.

protecting the interests of employers and effective and responsible drug-abuse ams.

l, the Institute disseminates information to development of workplace drug-abuse treatment programs, and participates in – including public-sector legal, regulatory, orums – on the development of the law on nce-abuse prevention throughout the United itute has developed an enormous amount of urrent laws, regulations, and workplace ctices regarding substance-abuse prevention. Institute has extensive information on the failures of workplace substance-abuse hat measures have proven most effective.

believes that its *amicus curiae* participation Court in this proceeding. The Institute and ng a unique "hands-on" perspective to the the efficacy and value of meaningful drug- s. Its members have implemented such plied them to sizable portions of the nation's , thus, have substantial experience with the ctive programs. Accordingly, the Institute s have an important perspective on the critical volved in this case which the Court should

RE, the Institute for a Drug-Free Workplace quests that the Court grant its motion and the accompanying brief as an *amicus curiae* e Petitioner.

Respectfully submitted,

PETER A. SUSSER
Counsel of Record
MARK A. DE BERNARDO
KATHERINE A. GOETZL
LITTLER MENDELSON, P.C.
1225 I Street, N.W., Suite 1000
Washington, D.C. 20005
(202) 842-3400

Counsel for Amicus Curiae,
The Institute for a
Drug-Free Workplace

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF *AMICUS CURIAE*, THE INSTITUTE FOR A DRUG-FREE WORKPLACE, IN SUPPORT OF THE PETITIONER

INTEREST OF THE *AMICUS*[1]

The Institute for a Drug-Free Workplace (the "Institute") is a non-profit coalition of major businesses and business organizations dedicated to promoting and protecting the interests of employers and employees in effective and

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[1] The Institute hereby certifies, in accordance with Rule 37.6 of this Court, that no counsel for a party authored this brief in whole or in part, and no person or entity, other than the Institute for a Drug-Free Workplace, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

responsible drug-abuse prevention programs. The Institute includes in its membership many of the largest employers in the United States, and a wide range of companies of all sizes, chambers of commerce, trade associations, and community coalitions.

Among other functions, the Institute disseminates information to assist employers and employees in drug-abuse prevention and treatment programs, and to positively influence the national, state, and local consideration of drug-abuse prevention issues. The Institute is uniquely situated to provide relevant and helpful information on the nature and dangers of substance abuse, and on the design and implementation of effective policies and procedures to combat those problems in the workplace, particularly where such policies promote the safety and welfare of employees, their co-workers, and the public at large.

The Institute has a significant interest in the questions presented in this case. By holding that an arbitration award reinstating an employee, who has repeatedly tested "positive" for illegal drug use, to a safety-sensitive position does *not* violate public policy, the U.S. Court of Appeals for the Fourth Circuit has failed to recognize the substantial risks that such an employee poses, the increased likelihood that his drug-related impairment could cause or contribute to an accident, and the potentially catastrophic consequences of such an accident. The decision would inappropriately and unjustifiably undermine employers' ability to provide safe workplaces, and to take necessary steps to protect life, property, and the environment.

The Institute's members have a strong interest in ensuring that the disciplinary component of their drug-free workplace policies cannot be evaded by employees who – like the employee in this case – claim to have temporarily relapsed into illegal drug use because of a "personal/family

problem." A policy of mandatory reinstatement of a safety-sensitive employee who tested "positive" for marijuana, if left undisturbed by this Court, would severely cripple the very positive deterrent effect that drug-free workplace programs have on employee substance abuse.

Many of the Institute's members – and countless other employers who are either required to, or choose to, drug test their employees – have multi-state operations. The current split between the Courts of Appeals regarding whether an arbitration award reinstating a safety-sensitive employee who has tested "positive" for illicit drug use violates public policy hinders employers' ability to enforce their drug-free workplace policies. Therefore, a definitive resolution of this issue by the Court is necessary.

INTRODUCTION AND SUMMARY

The Fourth Circuit's decision to uphold the arbitrator's award reinstating former employee James Smith ("Mr. Smith") violates the well-established public policy against allowing drug-impaired employees to work in safety-sensitive positions. As the First, Third, Fifth, Eighth, and Eleventh Circuits have recognized, prohibiting reinstatement of safety-sensitive employees who have tested "positive" for illicit drug use is a logical and necessary application of that public policy. That public policy – grounded in concerns relating to public, environmental, and workplace safety – is of overriding importance, and requires that the Fourth Circuit's decision be reversed.

Petitioner's employee, Mr. Smith, was a Mobile Equipment Operator. That position required a Commercial Driver's License, and thus Mr. Smith was subject to drug and alcohol testing under the U.S. Department of Transportation's regulations. In addition, Petitioner's drug-

free workplace policy requires all employees to submit to random drug testing. Petitioner's policy provided that a driver who tests "positive" for illegal drugs will be removed from any safety-sensitive position and subject to disciplinary action up to and including termination.

In March 1996, Mr. Smith tested "positive" for marijuana, and Petitioner suspended him with an intent to discharge him. Mr. Smith grieved Petitioner's action. An arbitrator reinstated Mr. Smith on the condition that he participate in a substance-abuse prevention program and submit to random drug testing for the following five years. Sixteen months after his first "positive" test, Mr. Smith tested "positive" for marijuana again. Petitioner suspended Mr. Smith, who grieved the impending discharge through his union, the Respondents in this case. The arbitrator reinstated Mr. Smith, finding credible his testimony that "a personal/family problem... caused this one time lapse in drug usage." Seemingly acknowledging the danger of reinstating Mr. Smith, the arbitrator noted "[i]f the arbitrator was misled by the grievant, the arbitrator is confident that the grievant will make another misstep with drug use and be caught."

Petitioner filed a lawsuit to vacate the arbitration award in the U.S. District Court for the Southern District of West Virginia, which ruled that the arbitration decision be enforced. Petitioner appealed that decision to the U.S. Court of Appeals for the Fourth Circuit, which affirmed the District Court's decision. Petitioner requested rehearing and rehearing *en banc*, which were denied.

The safety concerns that motivated the widespread adoption of workplace drug-testing policies, particularly for employees working in safety-sensitive positions, underscore a broad public policy against reinstating to safety-sensitive positions employees who have failed drug tests.

Reinstatement to a safety-sensitive position violates public policy by compromising multiple, compelling safety interests. Such a conclusion clearly violates public policy by undermining the myriad requirements that lawmakers and employers have adopted to ensure that employees who are substance abusers are not employed in these positions. Despite this well-defined public policy against reinstatement of safety-sensitive employees who have tested "positive," the Fourth Circuit upheld the reinstatement of Mr. Smith to his safety-sensitive position. If this arbitration had been held in the First, Third, Fifth, Eighth, or Eleventh Circuit, the award would have been vacated.

For these reasons, the Institute urges this Court to grant the petition for a writ of certiorari, and to reverse the decision of the Fourth Circuit.

ARGUMENT

I. PUBLIC POLICY DICTATES THAT DRUG- OR ALCOHOL-ABUSING EMPLOYEES NOT BE PERMITTED TO WORK IN SAFETY-SENSITIVE POSITIONS.

This Court, the Executive Branch, and the Legislative Branch, as well as numerous lower federal and state courts – and state legislatures that have dealt with the drug-testing issue – have articulated a consistent and forceful legal doctrine that to permit safety-sensitive employees to engage in illicit drug and alcohol use – including reporting to work with a detectable amount of drugs or alcohol in one's system – would violate public policy.

A clearly defined and dominant public policy supports the removal of potentially drug- or alcohol-impaired workers

from safety-sensitive positions. This policy has been expressed explicitly again and again through a large volume of Executive Orders, federal legislation, federal regulations, and state legislation.

A. The U.S. Supreme Court Has Recognized the Public Policy Against Employing Drug or Alcohol Abusers in Safety-Sensitive Positions.

This Court, in *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989), and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), recognized the public policy against allowing impaired employees to work in *safety-sensitive* positions – such as the position Mr. Smith held at Eastern Associated Coal Corporation.

In *Skinner*, this Court held that in light of the great potential harm that drug- or alcohol-impaired employees may cause in the railroad industry, railroad employees could be required to undergo drug and alcohol testing, despite the Constitutional prohibition against the government requiring unreasonable searches of individuals.

Similarly, in *Von Raab*, this Court held that Customs employees who carry firearms could be subject to mandatory drug testing because of the dangers associated with the possible impairment of agents in these positions.

B. The Executive and Legislative Branches of the Federal Government Have Recognized the Public Policy Against Employing Drug or Alcohol Abusers in Safety-Sensitive Positions.

The policy against employing substance abusers in safety-sensitive positions also has been incorporated into

federal law by the Executive and Legislative Branches. Executive Order 12,564, issued by President Reagan in 1986, mandated that the heads of all executive agencies of the federal government establish a drug-free workplace.

In 1988, Congress enacted the Drug-Free Workplace Act, which requires all federal contractors and grantees to establish a drug-abuse prevention program including education, counseling, and penalties for drug use. 41 U.S.C. app. § 702(a) (1994).

Congress next enacted (by wide vote margins in both the Senate and the House of Representatives) the Omnibus Transportation Employee Testing Act of 1991, 49 U.S.C. app. § 2717 (1994). Pursuant to this law, the Department of Transportation, through its five operating agencies, established mandatory substance-abuse prevention requirements for 8.1 million workers in safety-sensitive, transportation-related positions in the private sector (including, of course, Mr. Smith's position). The Federal Aviation Administration ("FAA"), the U.S. Coast Guard ("USCG"), the Federal Railroad Administration ("FRA"), the Federal Highway Administration ("FHWA"), and the Federal Transit Administration ("FTA") promulgated detailed regulations in this area, all of which reflect the fundamental policy judgment that no drug- or alcohol-impaired employees should work in safety-sensitive positions in transportation operations – and all of which require the *removal* of employees who test "positive" from such positions.[2]

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[2] *See* 14 C.F.R. Part 121, Appendices I and J (1994) (FAA); 46 C.F.R. Part 16 (1994) (USCG); 49 C.F.R. Part 219 (1995) (FRA); 49 C.F.R. Part 382 (1995) (FHWA); 49 C.F.R. Part 653 (1994) (FTA).

The Departments of Energy ("DoE") and Defense ("DoD") also have issued regulations to ensure that safety-sensitive jobs are not performed by drug abusers. DoE and DoD contractors must have programs to identify those who engage in illicit drug use, including testing of employees in sensitive positions – that is, positions that pose dangers to public health and safety. 10 C.F.R. Ch. III, § 707.5(a)(1) (1994); 48 C.F.R. § 252.223-7004(c)(4)(i) (1994).[3]

C. State Legislatures Have Recognized the Public Policy Against Employing Drug or Alcohol Abusers in Safety-Sensitive Positions.

A vast majority of the states also have recognized this public policy in one way or another. Many state legislatures have enacted statutes encouraging and rewarding employers who implement drug-free workplace policies and programs, including drug testing, by excluding substance abusers from unemployment and workers' compensation benefits.

For example, 24 state unemployment compensation statutes explicitly deny unemployment benefits to workers who were dismissed due to alcohol or drug use.[4] In the absence of an explicit statutory provision, unemployment commissions in a majority of other states faced with a

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[3] *See also* 48 C.F.R. Part 1852 (1994) (National Aeronautics and Space Administration drug-testing requirements for contractors); 10 C.F.R. Part 26 (1994) (Nuclear Regulatory Commission drug-testing requirements for nuclear plant employees).

[4] *See, e.g.*, ALA. CODE § 25-4-78 (Supp. 1998); ARIZ. REV. STAT. § 23-619.01 (1993); CAL. UNEMP. INS. CODE § 1256.5 (West Supp. 1999); FLA. STAT. ANN. § 443.101 (West 1997 & Supp. 1999); GA. CODE ANN. § 34-8-194 (Michie 1998); LA. REV. STAT. ANN. § 23:1601(10) (West Supp. 1999); VA. CODE ANN. § 60.2-618(2)(b) (Michie 1998); W. VA. CODE § 21A-6-3 (1996).

worker dismissed for drug or alcohol use also have denied claims for unemployment benefits.[5]

Similarly, 45 states have enacted explicit statutory limitations on the receipt of workers' compensation benefits by an employee who is injured due to his or her own drug or alcohol use.[6] In the absence of statutory provisions for automatic denial of benefits, state courts also have denied intoxicated and/or drug-impaired employees these benefits.[7]

While these statutes and rulings vary by state, the policy is manifestly clear in each case: employees should *not* be permitted to recover compensation when they intentionally endanger themselves and others by using drugs and alcohol.

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[5] *See, e.g., Risch v. State*, 879 P.2d 358 (Alaska 1994); *Clevenger v. Employment Security Department*, 770 P.2d 866 (Nev. 1989); *Warren v. Employment Security Department*, 724 P.2d 227 (N.M. 1986).

[6] *See, e.g.*, ALA. CODE § 25-5-51 (1992); CAL. LAB. CODE § 3600 (West 1989 & Supp. 1999); FLA. STAT. ANN. § 440.09 (West 1993); GA. CODE ANN. § 34-9-17 (1998); LA. REV. STAT. ANN. § 23:1081 (West 1998); MISS. CODE ANN. § 71-3-7 (1995); TEX. LAB. CODE ANN. §§ 406.032 & 401.013 (West 1996); VA. CODE ANN. § 65.2-306 (Michie 1995); W. VA. CODE § 23-4-2 (Supp. 1998).

[7] *See, e.g., Parro v. Industrial Commission of Illinois*, 657 N.E.2d 882 (Ill. 1995).

II. PROHIBITING REINSTATEMENT OF SAFETY-SENSITIVE EMPLOYEES WHO FAIL WORKPLACE DRUG TESTS IS A LOGICAL AND NECESSARY APPLICATION OF THE PUBLIC POLICY WHICH GIVES PRIORITY TO EMPLOYEE, PUBLIC, AND ENVIRONMENTAL SAFETY.

The First, Third, Fifth, Eighth, and Eleventh Circuits all have ruled that arbitration awards reinstating employees who have tested "positive" for illicit drug use to safety-sensitive positions violate public policy.[8] However, the Second, Fourth, Sixth, Ninth, and Tenth Circuits have reached the opposite conclusion.[9] This disagreement between the Courts of Appeals renders this issue ripe for resolution by this Court.

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[8] *See Exxon Corp. v. Esso Workers Union, Inc.*, 118 F.3d 841 (1st Cir. 1997); *Exxon Shipping Co. v. Exxon Seamen's Union*, 11 F.3d 1189 (3d Cir. 1993); *Exxon Corp. v. Baton Rouge Oil & Chem. Workers Union*, 77 F.3d 850 (5th Cir. 1996); *Union Pacific Railroad v. United Transp. Union*, 3 F.3d 255 (8th Cir. 1993); *Delta Air Lines, Inc. v. Air Line Pilots Ass'n Int'l*, 861 F.2d 665 (11th Cir. 1988).

[9] *See IBEW, Local 97 v. Niagara Mohawk Power Corp.*, 143 F.3d 704 (2d Cir. 1998); *Eastern Associated Coal Corp. v. United Mine Workers of America*, No. 98-2527, 1999 WL 635632 (4th Cir. Aug. 20, 1999); *Tennessee Valley Authority v. Tennessee Valley Trades and Labor Council*, 184 F.3d 510 (6th Cir. 1999); *United Transportation Union v. Union Pacific Railroad Co.*, 116 F.3d 430 (9th Cir. 1997); *Kennecott Utah Copper Corp. v. Becker*, 195 F.3d 1201 (10th Cir. 1999).

A. Reinstatement of Employees Who Fail Drug or Alcohol Tests Violates an Established and Appropriate Public Policy Because It Drastically Undermines Employer Efforts to Prevent the Placement of Substance Abusers in Hazardous Positions.

Employers with safety-sensitive operations hire from a population in which nearly three-quarters of America's illicit drug users are employed.[10] The U.S. Department of Health and Human Services has estimated that one out of every four Americans is directly affected by the alcohol or drug dependency of a family member, friend, or co-worker.[11]

Companies with employees who perform safety-sensitive tasks must be able to decrease the likelihood of accidents which have substantial – and sometimes tragic – human, economic, and environmental costs.

In addition, these companies have a statutory duty under the Occupational Safety and Health Act to ensure safe and healthy workplaces for all of their employees. 29 U.S.C.A. § 654 (a)(1) (1985).

Furthermore, employers are liable in tort to individuals who suffer personal injury and/or property damage as a result of an accident. When catastrophic events occur as the result of the drug or alcohol use of employees in safety-

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[10] According to the most recent government figures, 73 percent of all current illicit drug users are employed. Substance Abuse and Mental Health Services Administration, U.S. Department of Health and Human Services, *1998 National Household Survey on Drug Abuse* (August 1999).

[11] Substance Abuse and Mental Health Services Administration, U.S. Department of Health and Human Services, *1994 National Household Survey on Drug Abuse* (September 1995).

sensitive positions, the financial consequences can be staggering.

Thus, companies clearly need to be able to reduce the likelihood of accidents, not only because of the severe economic burden that the company would face in the wake of such an accident, but also because of the human suffering and harm that is a realistic threat.

Drug and alcohol use are known to substantially impact workplace safety. For example, drug-using employees were found to be 3.6 times more likely to be involved in a workplace accident than are employees who do not use drugs.[12] In addition, a Utah Power and Light study estimated that employees testing "positive" on preemployment drug tests were five times more likely to be involved in a workplace accident than those who tested "negative."[13]

Given the magnitude of the nation's drug- and alcohol-abuse problem, it would be naive to assume that employees in safety-sensitive positions do not abuse drugs or alcohol. In fact, the latest drug-test "positive" figures show otherwise: 4.8 percent of the 5.7 million employees and applicants who were tested for drugs at SmithKline Beecham laboratories in 1998 tested "positive."[14]

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[12] Thomas E. Backer, *Strategic Planning for Workplace Drug-Abuse Problems*, National Institute on Drug Abuse, at 4 (1987).

[13] Dennis Crouch, M. Birky, et al., National Institute on Drug Abuse, *A Critical Evaluation of the Utah Power and Light Company's Substance-Abuse Management Program: Absenteeism, Accidents, and Costs*, Drugs in the Workplace: Research and Evaluation Data, at 169-93 (1989).

[14] SmithKline Beecham, *SmithKline Beecham Drug Testing Index* (March 16, 1999).

Of more direct relevance and significance, out of more than 650,000 drug tests performed by that one commercial laboratory on safety-sensitive transportation workers, 3.4 percent tested "positive" for illegal drug use. That percentage indicates that *at least* 22,100 individuals in safety-sensitive jobs in the transportation industry who *knew* they were subject to periodic testing *still* tested "positive" for illicit drug use.

Furthermore, in a national survey of employees, 35 percent of full-time employees surveyed by the Gallup Organization said they had "personally seen or heard of" illicit drug use on the job, and 43 percent said that drug use in their workplace "seriously affects their ability to get the job done."[15] In addition, 59 percent agreed that alcohol abuse is a major workplace problem.

The devastating effects of alcohol- and drug-impaired employees are evident in several studies. Between 1975 and 1986, more than 50 train accidents were directly attributed to drug or alcohol abuse, resulting in 37 fatalities, 80 injuries, and more than $34 million in property damage.[16]

Other studies have documented declines in workplace accidents after substance-abuse problems were decreased or eliminated through workplace drug testing. For example, a survey of construction industry companies revealed that

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[15] *Survey of 1,006 Full-Time Employees, Aged 18 and Older, Working Outside of the Home,* conducted for the Institute for a Drug-Free Workplace by the Gallup Organization, Princeton, New Jersey (November 1995).

[16] *Battling the Enemy Within*, Time, March 17, 1986, at 52.

where substance-abuse testing was implemented, workplace accidents declined by 34 percent.[17]

Studies of workers who test "positive" for drug use establish that the costs of workplace substance abuse can be cut following implementation of substance-abuse detection programs. For example, the U.S. Post Office and the Georgia Power Company found that they could have saved $105 million and $1.7 million, respectively, by discharging employees who failed drug tests.[18]

Legislators, regulators, and employers have relied on this information and similar data in formulating policies and strategies to protect the public from these well-documented risks. If arbitrators and courts effectively mandate that a safety-sensitive employee who tests "positive" for illegal drugs *twice* should be reinstated, they will frustrate the underlying purposes of these laws, regulations, and policies, and place the public at much greater risk.

B. Employers with Effective Substance-Abuse Prevention Programs Terminate Employees Who Twice Test "Positive" for Illicit Drug Use.

For a drug-testing program to be effective, there have to be appropriate sanctions which employees *know* will result if

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[17] National Association of Plumbing-Heating-Cooling Contractors, *The Construction Industry Survey on Substance Abuse* (April 1992).

[18] United States Postal Service, Personnel Research & Development Branch, Office of Selection and Evaluation, *Preemployment Drug Testing: Associations with EAP, Disciplinary, and Medical Claims Information* (July 1992); J. Sheridan & H. Winkler, National Institute on Drug Abuse, *An Evaluation of Drug Testing in the Workplace*, Drugs in the Workplace: Research & Evaluation Data, at 195 (1989).

they violate the policy. A survey of the Institute's members found that 70 percent of the corporations *always* terminate employees for a second "positive" test.[19] In addition, a survey of the Institute's members in the oil and chemical industries found that 82 percent terminate employees for a second "positive" test, and 94 percent sometimes terminate employees for a first "positive" test.[20]

If safety-sensitive employees must be reinstated after a second "positive" drug test, their employers' drug-free workplace policies are rendered impotent. They essentially have no deterrent effect, and the detection impact is greatly reduced as a segue to rehabilitation opportunities.

Thus, the perpetuation of such a precedent would destroy the value of workplace drug-testing programs. If drug-abusing employees know they can be caught without there being adverse consequences, they would not fear being caught. Thus, the incentives to stop engaging in illicit drug abuse – or not to start – would be eviscerated.

C. Alcoholism and Drug Addiction Are Chronic Conditions for Which the Risk of Relapse Never Disappears.

Drug addiction and alcoholism are chronic diseases, and the likelihood of relapse at any given time is both real and unpredictable. Medical evidence shows that for addicted individuals who seek rehabilitative services, the recidivism rate is disturbingly high. One study of alcohol recidivism,

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[19] Institute for a Drug-Free Workplace. *"Member Survey: Corporate Drug and Alcohol Policies and Programs."* Washington, D.C. (1994).

[20] Institute for a Drug-Free Workplace. *"Oil and Chemical Industries Survey of Corporate Substance-Abuse Prevention Programs and Policies."* Washington, D.C. (1996).

for example, reported that approximately 90 percent of alcoholics are likely to experience at least one relapse over the four-year period following treatment.[21]

A good-faith attempt by highly motivated individuals to cease the use of abusive substances does not guarantee a cure: in a 15-year study of alcoholics who were able to abstain for two years, 41 percent later relapsed, many after more than a decade of abstinence.[22]

Success in overcoming drug dependency is even more elusive. A nationally representative longitudinal study of drug users showed that five years after completing rehabilitation, the treated individuals reported a 21 percent decline in the use of any illicit drug – meaning that 79 percent continued to use drugs at least at the same rate as they did before treatment.[23] Another recent study reported that approximately 55 percent of people with chemical dependency are prone to relapse at some time.[24]

While these figures demonstrate that some substance abusers may profit from treatment, they in no way support a

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[21] J.M. Polich *et al.*, Stability and Change in Drinking Patterns, The Course of Alcoholism: Four Years After Treatment 159-200 (1981).

[22] George Vaillant, M.D., *A Long-Term Follow-Up of Male Alcohol Abuse*, Archives of General Psychology, Volume 53 (March 1996).

[23] The study analyzed the success rates of in-patient, out-patient, and a variety of other types of rehabilitation programs. Office of Applied Studies, Substance Abuse and Mental Health Services Administration ("SAMHSA"), *Services Research Outcomes Study* (1998). The study is accessible through SAMHSA's web site at http://www.samhsa.gov.

[24] M. Dusoe, *The Use of Self-Efficacy Training in the Treatment of Relapse-Prone Individuals*, EAPA Exchange at 6 (February 1995).

conclusion that a former drug user who is able to return to work is cured. In short, *no one* can guarantee that an alcoholic, or a drug addict or chronic drug abuser, can abstain, will abstain, or will – or will not – relapse. Nor can one say when and under what circumstances that relapse will occur.

What treatment professionals *can* predict is that relapse: (1) is *more* likely to occur during times of heightened tension or pressure (including on-the-job stress),[25] (2) is often linked to interpersonal conflicts (which may arise away from work and of which the employer is unlikely to have knowledge),[26] and (3) is *more* likely to occur when the historically substance-abusing individual is in isolation or relative isolation (such as in a job without on-going direct supervision).[27]

Significantly, in a world where the majority of individuals with substance-abuse problems have few or no treatment options – or, at most, are offered three months of rehabilitative services – 85 percent of those treated at the highly regarded and well-funded addiction-treatment program at Phoenix House who *began* the program were unable to complete the two-year treatment.[28]

While no doctor, employee assistance professional, or counselor can *ever* determine that *any* individual is fully recovered and/or rehabilitated – nor can anyone predict or prevent a relapse with any certitude – all reach one universal conclusion: the rate of relapse *always* will be higher than the

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[25] R.L. Rogers & C.S. McMillan, Relapse Traps: How to Avoid the 12 Most Common Pitfalls In Recovery (Bantam Books 1991).

[26] A. Beck *et al.*, Cognitive Therapy of Substance Abuse (1993).

[27] *See* n.25.

[28] "*Traditional Drug Programs Face Up to Chronic Recidivism*," Washington Post (August 20, 1990).

rate of first-time addiction or alcoholism. The bottom line is irrefutable: those with a history of substance abuse pose a *much* greater risk of relapse and its attendant risks than those without such a history.[29]

The undeniable truth is that an historically addicted individual may relapse into self-destructive addictive behavior – without obvious signs or warning, at any time, even after years of sobriety or abstinence. If that individual's job includes safety-sensitive responsibilities, as Mr. Smith's job did, the consequences of a relapse could be disastrous.

D. Reinstatement of a Safety-Sensitive Employee Who Failed a Drug Test Sends the Wrong Message to Courts, Arbitrators, Employers, and Employees Regarding a Compelling Public Policy.

Reinstatement of Mr. Smith would subvert public policy, and send a jarring signal to employers that work strenuously – and successfully – to achieve the goal of a drug-free workplace, particularly in safety-sensitive environments. Rather than reinforcing the clear and dominant policy direction of government at all levels, the Fourth Circuit's holding – unless reversed – would frustrate employers' efforts to protect all at-risk parties and interests from potentially catastrophic harm. It would condone employee misconduct – illegal drug use – and undermine a very legitimate and widely accepted tool in achieving the critical social goal of drug-abuse prevention.

The ruling of the Fourth Circuit in this proceeding inappropriately subordinates the compelling interest of keeping drug abusers out of safety-sensitive positions. It would improperly insulate employee action at odds with the

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[29] *See, supra*, n.22.

goals (substance-abuse prevention) and methodology (testing and disciplinary action) widely embraced by both the public and private sectors, and would otherwise tend to perpetuate the harm which public policy seeks to avoid.[30]

Employer practices throughout the country have proven that comprehensive drug-testing and drug-abuse prevention programs with known, uniform consequences are the most effective means of preventing the potential harm that employee drug abuse can cause. The effectiveness of drug testing, however, is *severely* compromised when employees terminated for illegal drug use are reinstated. The current unpredictability – and sometimes irrationality – of arbitration decisions in this regard fundamentally undermines the effectiveness of workplace drug testing.

Clear tenets of public policy argue against allowing impaired employees and employees who test "positive" for illicit drug use to perform safety-sensitive jobs. The Institute urges the Court *not* to frustrate employers and employees in their efforts – and considerable success to date – in achieving drug-free workplaces. The Court should preserve employers' rights to have meaningful and effective drug-testing programs, and to terminate safety-sensitive employees for "positive" drug tests.

In summary, if the Fourth Circuit's decision is not reversed, drug testing will be much less effective at deterring drug abuse. There will be *more* drug abuse by employees, a substantial compromise of workplace safety, and an undermining of *most* employers' current substance-abuse prevention programs and policies. A policy which results in

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[30] *See, e.g., Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840 (2d Cir. 1990) (arbitrator's reinstatement of employee terminated for sexual harassment vacated due to conflict with and adverse effect upon public policy interests).

more drug abuse cannot be a good thing. Protecting the rights of the "James Smiths" of our society to continue to engage in dangerous and illegal behavior, while neglecting the rights of others *not* to be endangered by the continued employment of a known, repeated drug abuser in a safety-sensitive position is the height of illogic. It is wrong. The Fourth Circuit was wrong. The U.S. Supreme Court should right this wrong.

CONCLUSION

The Institute for a Drug-Free Workplace respectfully urges the Court to grant the writ of certiorari to review the judgment below, to reverse the rulings that would require the reinstatement of Mr. Smith despite his illegal misconduct and violation of company policy – specifically, his repeated "positive" drug tests – and to recognize that his mandated reinstatement would be a clear, unnecessary, and indefensible violation of public policy.

Respectfully submitted,

PETER A. SUSSER
Counsel of Record
MARK A. DE BERNARDO
KATHERINE A. GOETZL
LITTLER MENDELSON, P.C.
1225 I Street, N.W., Suite 1000
Washington, D.C. 20005
(202) 842-3400

Counsel for Amicus Curiae,
The Institute for a
Drug-Free Workplace

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